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this Memorandum Decision shall not be  
regarded as precedent or cited before  
any court except for the purpose of  
establishing the defense of res judicata,  
collateral estoppel, or the law of the case.**

ATTORNEY FOR APPELLANT:

**DOUGLAS M. GRIMES**  
Gary, Indiana

ATTORNEY FOR APPELLEE:

**NANCY A. McCASLIN**  
McCaslin & McCaslin  
Elkhart, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN RE THE MARRIAGE OF	)	
	)	
JOHNNY W. ULMER	)	
	)	
Appellant-Petitioner,	)	
	)	
and	)	No. 20A05-0701-CV-61
	)	
CHRISTEL J. GEZELS,	)	
	)	
Appellee-Respondent.	)	

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**APPEAL FROM THE ELKHART SUPERIOR COURT**  
The Honorable David A. Denton, Special Judge  
Cause No. 20D01-0308-DR-445

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**May 2, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

Appellant Johnny W. Ulmer (“Ulmer”) appeals a post-dissolution award of attorney’s fees in favor of his ex-wife Christel J. Gezels (“Gezels”). We affirm an award of attorney’s fees to Gezels but revise the amount to \$10,520.80.

## **Issues**

Ulmer presents a single issue for review: whether he was denied due process because the trial court did not conduct an evidentiary hearing on attorney’s fees.

Gezels raises a single issue: whether she is entitled to an award of appellate attorney’s fees.

## **Facts and Procedural History**

On November 29, 2004, the marriage of Ulmer and Gezels was dissolved. Ulmer was awarded the physical custody of the parties’ three children, and Gezels was awarded parenting time. Gezels was not ordered to pay child support, but her request for spousal maintenance was denied. In a post-dissolution order, the trial court awarded Gezels marital property valued at \$1,000.00, awarded Ulmer marital property valued at \$66,521.30 and ordered him to pay an equalization amount of \$32,760.65 to Gezels (subsequently amended to \$35,510.50).

Thereafter, the parties litigated issues concerning parenting time, transfer of personal property items, payment of the equalization judgment, garnishment of wages, Gezels’ psychological evaluation, and allegations of contempt of court against each party. Ulmer attempted to perfect an interlocutory appeal in this Court; the attempted appeal was dismissed on June 20, 2006.

On June 26, 2006, the parties and their counsel appeared in the Elkhart Superior Court. Ulmer designates this hearing as a rule to show cause hearing while Gezels designates this hearing as an attorney's fees hearing. On July 6, 2006, Ulmer filed his "Objection to Attorney Fee Request." (App. 40.) Gezels filed her response to the written objection on July 27, 2006. On November 6, 2006, the trial court ordered Ulmer to pay Gezels' attorney's fees of \$12,583.30. Ulmer appeals.

## **Discussion and Decision**

### **I. Attorney's Fees**

Ulmer contends he was denied procedural due process because the trial court did not conduct an attorney's fees hearing to ascertain the respective financial positions of the parties and the reasonableness of the fees sought.

The Due Process Clause of the United States Constitution and the Due Course of Law Clause of the Indiana Constitution both prohibit state action that deprives a person of life, liberty or property without a fair proceeding. Everhart v. Scott Co. Office of Family and Children, 779 N.E.2d 1225, 1229 (Ind. Ct. App. 2002), trans. denied. Due process minimally requires notice, an opportunity to be heard, and an opportunity to confront witnesses. Castro v. State Office of Family and Children, 842 N.E.2d 367, 375 (Ind. Ct. App. 2006), trans. denied.

Ulmer did not request a transcription of the June 26, 2006 hearing that he claims was devoted to an alleged contempt of court for failure to tender personal property. In her Appellee's Appendix, Gezels provided a partial transcription, the substance of which is not contested by Ulmer. The partial transcript states in relevant part:

Attorney Grimes: ... I would like a hearing on attorney fees, Judge.

Attorney Walker: That's what we are here for today.

Attorney Grimes: No, no, I don't have anything about your attorney fees. I don't have anything and I am not going to sit here and try to come up to date with your attorney fees. We're not here on attorney fees. We are here for the rule to show cause with regard to the personal property.

Court: And any rule to show cause.

Attorney Grimes: I have nothing on attorney fees. . . .

Court: Well, I'll tell you what we'll do. I've gotta go take a plea. We are scheduled for all day tomorrow. Do we have much evidence to do?

Attorney Grimes: There's no more evidence.

Court: Alright, Mr. Walker, why don't you serve Mr. Grimes with a copy of what you have there with the understanding it's not complete apparently for today and tomorrow?

Attorney Walker: Well, the work that I did yesterday in preparing is not on here. That's I think 45 minutes. Today and tomorrow is not on there.

Court: We'll give you leave to supplement. Do you want to come back in the morning and argue the fees?

Attorney Grimes: Judge, I really won't be able to come back tomorrow morning.

Attorney Walker: We are scheduled for tomorrow morning.

Court: Yeah, we are scheduled for all day tomorrow.

Attorney Grimes: You know, whatever the court does, will, will, whatever the court orders, we'll deal with it. So the court can enter whatever order it chooses. We'll deal with it then. We (inaudible) any objections but whatever the court chooses.

Court: You give a copy of your fee thing to Mr. Grimes and we'll give him 10 days to respond to that. He can do it in writing.

Attorney Grimes: That's right. ...

Court: Let's give him a chance to look at the record and look at what you filed and is that enough? 10 days?

Attorney Grimes: That will be fine.

Court: I'll just hold this under advisement until I hear.

Attorney Grimes: That's fine, Judge.

(Appellee's App. 50-53.) (emphasis added.) Thereafter, Gezels' counsel, Attorney Walker, presented argument on the propriety of an attorney's fees award, to which Ulmer's counsel, Attorney Grimes, responded "No, I have no comments, Your Honor." (Appellee's App. 55.)

From this record, it is apparent that Ulmer was not deprived of notice and opportunity to respond to Gezels' request for attorney's fees. Even assuming that he needed to advise the trial court of changes in the parties' respective financial positions since previous hearings, Ulmer elected not to present an argument on June 26, 2006, to appear for an evidentiary hearing on June 27, 2006, or to request a continuance. His attorney specifically and repeatedly advised the trial court that the opportunity to respond in writing was adequate.

A party may not take advantage of an error that he commits, invites, or which is the natural consequence of his own neglect or misconduct. Batterman v. Bender, 809 N.E.2d 410, 412 (Ind. Ct. App. 2004). Invited error will not result in this Court's reversal of an attorney fees award by the trial court. See id.

However, Ulmer also presents a cursory argument that the award was excessive. Gezels concedes that the statement of attorney's fees upon which the trial court based its award contained some duplicate and inaccurate entries. Consequently, Ulmer was

overcharged \$2,062.50 (consisting of a duplicate entry of \$262.50 and an entry of \$1,800.00 for trial representation that did not take place). Therefore, the award of attorney's fees must be revised to \$10,520.80.

## II. Appellate Attorney's Fees

Gezels requests an award of appellate attorney's fees, alleging that Ulmer pursued an appeal permeated by procedural and substantive bad faith.

Indiana Appellate Rule 66(E) provides in relevant part: "The Court may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees." However, our discretion to award attorney's fees under this rule is limited to instances when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay. Helmuth v. Distance Learning Systems Indiana, Inc., 837 N.E.2d 1085, 1094 (Ind. Ct. App. 2005). Additionally, we must use extreme restraint when exercising this discretionary power because of the potential chilling effect upon the exercise of the right to appeal. Id. A strong showing is required to justify an award of appellate damages, and the sanction is not imposed to punish mere lack of merit, but something more egregious. Id.

Procedural bad faith occurs when a party flagrantly disregards the form and content requirements of the rules of appellate procedure, omits relevant facts or misstates the record, and files briefs calculated to require the maximum expenditure of time by the opposing party and the reviewing court. Id. at 1094-95. Substantive bad faith occurs when the appellant's contentions and arguments are utterly devoid of all plausibility. Id. at 1095.

Ulmer did not provide this Court with a transcript of the June 26, 2006 hearing, choosing instead to characterize the hearing as one addressing an alleged contempt for failure to transfer personal property. This suggests procedural bad faith, as the text of that hearing was highly relevant to Ulmer's claim that he was not given a meaningful opportunity to contest attorney's fees. However, regardless of Ulmer's failure to artfully identify and support reversible error in his brief and Appendix, Ulmer was in fact ordered to pay excessive attorney's fees. Because Ulmer prevailed, in part, his challenge to the award of attorney's fees is not utterly devoid of plausibility. We conclude that an award of appellate attorney's fees is not warranted.

The award of attorney's fees is affirmed, as revised.

SHARPNACK, J., and MAY, J., concur.